Supreme Court, U.S.
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No. 97-1322

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

SHARON HOFFMAN, TRUDIE MATTHEWS, DIANE HOEFLING, REVEREND RONNIE WALLACE, AND REVEREND JOHN BRADLEY,

Petitioners,

-v-

JAMES B. HUNT, JR., Governor of the State of North Carolina, STATE OF NORTH CAROLINA, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

The petition for certiorari seeks review of two aspects of the Fourth Circuit's ruling below: first, its decision upholding a state statute, N.C. Gen. Stat. § 14-277.4, as applied; and second, its ruling upholding a federal statute, 18 U.S.C. § 248, on its face. The state and federal defendants have filed separate briefs in opposition, which petitioners address herein.

I. THIS COURT SHOULD GRANT REVIEW OF PETITIONERS' "AS APPLIED" CHALLENGE TO N.C.G.S. § 14-277.4.

The undisputed evidence and the findings of the district court "confirmed in disturbing detail," Pet. App. 46a, that petitioners were repeatedly threatened with arrest under the North Carolina "access" statute, N.C.G.S. § 14-277.4, for doing no more than peacefully picketing, leafletting, and sidewalk counseling on public rights of way outside abortion businesses in Charlotte, North Carolina. See Pet. at 2-6, 8; Pet. App. 32a-44a. The court of appeals expressly agreed that "the uncontroverted evidence shows that law enforcement officers have threatened [petitioners] with arrest under the statute for engaging in constitutionally protected activities." Pet. App. 12a.

> For example, individuals have been threatened with arrest for attempting to distribute literature to persons entering clinics. . . . On another occasion, a protestor was informed that her mere presence -- and the presence of other picketers -- violated the statute because patients were rescheduling their appointments. . . . [T]he record provides no indication that the activities in which [petitioners] engaged physically obstructed or blocked access to or egress from health care facilities.

Id. The North Carolina respondents did not put on any

contrary evidence in the district court. Pet. App. 31a, 41a. In this Court they do no more than cite evidence that suggests that one witness may have been confused, on one occasion, about whether a city ordinance or the challenged state statute was being enforced. See N.C. Br. in Opp. (hereafter "N.C. Opp.") at 4, 8-9. These respondents made no effort to call into question the overwhelming remainder of the evidence of unconstitutional enforcement of N.C.G.S. § 14-277.4.

The Fourth Circuit, faced with a mountain of undisputed evidence that the state statute had been enforced in an unconstitutional manner, nevertheless elected to decide an alternative, nonconstitutional question: whether the threats of arrest which petitioners faced under the challenged statute were legally authorized by that statute. Pet. App. 13a. The court held that the threats of enforcement were unauthorized, i.e., illegal, wholly aside from any possible unconstitutionality. Pet. App. 13a-14a.

The North Carolina respondents, pointing to this holding, urge that the Fourth Circuit simply applied the general rule that a court should prefer to decide a case on nonconstitutional grounds whenever possible. N.C. Opp. at 6-7, 9-10. However, the respondents overlook a crucial detail: the court of appeals ruled in favor of petitioners on the nonconstitutional ground, yet entered judgment in favor of respondents.

Certainly the court below could have affirmed the judgment for petitioners on nonconstitutional grounds. Or, the court below could have rejected the alternative nonconstitutional basis for the judgment and proceeded to decide the constitutional question. But to accept an alternative basis for challenging the threatened unconstitutional enforcement while rejecting petitioners' as applied challenge is simply bizarre. This is equivalent to saying, "Petitioners win. Let judgment be entered for respondents." Respondents, of course, make no attempt to explain or defend this perverse holding.

In effect, the court of appeals held that because the challenged state statute was constitutional on its face, the unconstitutional application of that statute was ipso facto unauthorized. Pet. App. 12a-14a; N.C. Opp. at 9-10. This holding would be bad enough, as it collapses the distinction between facial and as applied challenges and essentially abolishes the latter. Pet. at 12-14. But it is absurd beyond description to rule that, because the threatened enforcement was "improper and unsustainable," N.C. Opp. at 11, i.e., illegal, the petitioners' "as applied" challenge to the statute must fail.

This Court should grant review and summarily reverse the court of appeals as to petitioners' as applied challenge to N.C.G.S. § 14-277.4. In the alternative, this Court should grant plenary review.

II. THIS COURT SHOULD GRANT REVIEW OF PETITIONERS' FACIAL CHALLENGE TO FACE, 18 U.S.C. § 248.

Petitioners have demonstrated already that the federal Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, is unconstitutional because it both exceeds Congressional power under the Commerce Clause and violates the First and Fifth Amendments. Pet. at 14-30. Those arguments need not be repeated, as the federal respondents have failed to supply persuasive counterarguments. See Brief for United States in Opposition (hereafter, "U.S. Opp."). Several points regarding the position of the United States deserve special mention, however.

A. FACE Exceeds Federal Commerce Clause Power.

In United States v. Lopez, 514 U.S. 549 (1995), this Court reaffirmed that there is no plenary federal police power. Id. at 566. Congress does have power, under the Commerce Clause, to regulate "those activities that substantially affect

interstate commerce." Id. at 559 (emphasis added). To establish this "substantial relation to interstate commerce," id., the federal statute must either: contain an explicit jurisdictional element connecting the regulated activity to interstate commerce on a case-by-case basis, id. at 561; or, regulate intrastate economic activity (e.g., growing wheat, engaging in loan-sharking, pricing milk products) which, in the aggregate, substantially affects interstate commerce, id. at 559-61, 567.

FACE has no jurisdictional element. And as the Fourth Circuit admitted, "the activity regulated by FACE" -- obstructive protest activity -- is "not itself economic or commercial." Pet. App. 23a. Accordingly, FACE cannot be upheld without discarding the limits so recently articulated in Lopez. Pet. § II(B)(1).

The brief of the federal respondents illustrates precisely this constitutional flaw.

The United States offers no argument in defense of FACE that would not also "justify," under the Commerce Clause, any federal legislation designed to protect any business. See U.S. Opp. at 11 (regulated activities have "adverse impact" on business); id. at 12 (some patients and staff cross state lines to get to the business); id. at 13-14 (effect of regulated activities on business is "direct").

Moreover, there is no credible argument that FACE somehow addresses a unique problem for the world of commerce. If an alleged "1000 acts of violence"[1] throughout

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[1]Petitioners do not concede that this figure is in any way accurate. This grossly inflated figure simply reflects self-serving propaganda from proponents of the abortion industry. As this Court is surely aware, any true act of significant personal violence against an abortionist or abortion employee becomes instant, national news. There have not been anywhere near a dozen such

the entire nation over a period of more than 15 years suffices to justify special federal protection of the abortion industry, U.S. Opp. at 2, 12, without even the need for a statutory jurisdictional element, then it is a very simple matter to justify a federal shoplifting,[2] commercial burglary,[3] or vandalism statute, likewise without even any jurisdictional requirement. If that is so, then, contrary to this Court's repeated admonition, Congress does indeed have plenary police power, at least over all matters affecting businesses.[4] (A fortiori, Congress may likewise directly regulate business as well, whether the business be abortion, tobacco farming, bowling, or any other enterprise that in the aggregate has a substantial effect on commerce.)

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incidents, much less a thousand.

[2]In 1994 alone, there were over a million crimes of shoplifting in the United States, with an average value for stolen property of $133. Crime in the United States 1994 (FBI Uniform Crime Reports, Department of Justice, Nov. 19, 1995), p. 205, Table 23 (Offense Analysis, 1994, and Percent Change from 1993).

[3]In 1994 alone, there were over 750,000 burglaries of nonresidences (i.e., stores, offices, etc.), at an average valued loss of $1,341 per burglary. Crime in the United States 1994, supra note 2, p. 205, Table 23.

[4]"Prostitution and commercialized vice" -- an industry with an interstate commerce connection at least as strong as that of abortion -- was associated with 111 murders from 1990 through 1994 (compared to one murder of an abortionist from 1977 through April 1993, U.S. Opp. at 2). Crime in the United States 1994, supra note 2, p. 21, Table 2.14 (Murder Circumstances, 1990-1994). Under the theory proffered by the United States, a federal homicide-in-connection-with-prostitution statute would come within the Commerce power of Congress without any need to prove a jurisdictional element. Moreover, arguments over money or property spawned 2,349 murders from 1990 through 1994, id., presumably making such matters a fit matter for federal criminal legislation under the Commerce Clause as well.

The federal respondents apparently consider this Court's Lopez decision to be an aberration strictly limited to its facts. Were an amended Gun Free School Zones Act to proscribe possession of guns near businesses, instead of schools, or to proscribe use instead of mere possession of guns near schools, the United States contends, Lopez would not apply. U.S. Opp. at 13-14.

Petitioners reject this pinched view of Lopez. The Lopez decision is just one of many cases illustrating that this Court takes seriously the bedrock constitutional concepts of federalism and limited national government. E.g., Printz v. United States, 117 S. Ct. 2365 (1997); City of Boerne v. Flores, 117 S. Ct. 2157 (1997); Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

FACE represents an act of federal overreaching in violation of important constitutional limits on the power of Congress. The Commerce Clause simply does not enable Congress to pass a federal disorderly-conduct-and-obstruction statute.

B. FACE Violates the First and Fifth Amendments.

FACE treats identical conduct as prohibited or permitted, depending upon whether the actor is protesting abortion (prohibited) or not (permitted). Pet. at 24-27. It is therefore flagrantly viewpoint-based and unconstitutional. Id.

The United States seeks shelter for FACE in the draftcard-burning case, United States v. O'Brien, 391 U.S. 367 (1968). See U.S. Opp. at 17. But the statute at issue in O'Brien outlawed the destruction of draft cards, regardless of the actor's motive for the destruction. 391 U.S. at 370. Had that statute forbidden the burning of draft cards only when the actor destroyed the card "because such card furthers

military readiness or operations," for example, the analogy to FACE would be more apt and, like FACE, the statute would unconstitutionally penalize a disfavored viewpoint.

The United States is correct that certain motives may be made an element of an offense. U.S. Opp. at 16. But just because illegitimate motives (e.g., the race of the victim) may be targeted, it does not follow that a statutory violation could hinge upon -- and thus penalize -- a wholly proper motivation, such as one's own religious beliefs, political sympathies, opposition to war or abortion, etc. On the contrary, the latter sort of regulation would unconstitutionally burden the one constitutional absolute -- freedom of belief. Employment Division v. Smith, 494 U.S. 872, 877 (1990).

The United States claims that FACE is viewpoint neutral because it "is justified by the need to protect interstate commercial transactions, to protect women who seek to [abort], and to maintain public safety and order." U.S. Opp. at 15. This argument is specious. An environmental group's blockade of an abortion business would impinge these very same purported justifications, yet would not violate FACE. Pet. at 24-25 (quoting S. Rep. No. 117, 103rd Cong., 1st Sess. 24 (1993)). The only reason to allow a pro-environment blockade while prohibiting a pro-life blockade at the very same site is to penalize the pro-life viewpoint that motivates the latter conduct.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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